

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

FRANK L. JUDE, JR.,)	CASE NO.
)	
Plaintiff,)	06-C-1101
)	
v.)	
)	
CITY OF MILWAUKEE, et al.,)	
)	
Defendants.)	

HONORABLE LYNN ADELMAN
PRESIDING DISTRICT COURT JUDGE

MILWAUKEE, WISCONSIN

AUGUST 19, 2009

PARTIAL STATUS CONFERENCE
HELD IN THE ABOVE-ENTITLED MATTER

CYNTHIA M. BOHMAN, RMR
Official United States Court Reporter
517 E. Wisconsin Avenue, Room 208
Milwaukee, WI 53202
414-852-5482

1 APPEARANCES:

2 JONATHAN S. SAFRAN
3 JEFFREY PATZA
4 Samster, Konkel & Safran
5 1110 N. Old World 3rd St.
6 Milwaukee, WI 53203
7 appearing for Frank Jude.

8 MIRIAM R. HORWITZ
9 Milwaukee City Attorney's Office
10 200 E. Wells St.
11 Milwaukee, WI 53202
12 appearing for the City of Milwaukee.

13 MICHAEL A. I. WHITCOMB
14 Michael A.I. Whitcomb, SC
15 633 W. Wisconsin Ave.
16 Milwaukee, WI 53203
17 appearing for Daniel Masarik.

18 DAVID P. GERAGHTY
19 Darnieder & Geraghty
20 735 N. Water St.
21 Milwaukee, WI 53202
22 appearing for Ryan Lemke.

23 RAYMOND M. DALL'OSTO
24 Gimbel, Reilly, Guerin & Brown
25 330 E. Kilbourn Ave.
Milwaukee, WI 53202
appearing for Jon Clausing.

JOHN S. SCHIRO
Schiro & Zarzynski
735 W. Wisconsin Ave.
Milwaukee, WI 53233
appearing for Joseph Schabel.

P R O C E E D I N G S

* * *

THE COURT: All right. I'm prepared to rule on those if you want me to. So let's start with the motion to compel deposition from Officer Blum, is it? Is that how you pronounce it?

MR. SAFRAN: I believe so, yes.

THE COURT: All right. Blum has asserted his Fifth Amendment privilege in response to all deposition questions other than his name. I'm glad that's not in controversy.

The plaintiff wants to compel his testimony on ten topics, deposition preparation, background, employment history, assault and battery of Jude, his observations of that night, actions of other police officers that night, his actions that night, policies, practices and customs of the city with respect to hiring, training, et cetera, the alleged code of silence, and thin blue line within the police department, and the alleged group within the police department known as the Punishers.

The Fifth Amendment allows witnesses to refuse to answer questions on the ground that the answers might be incriminating or would furnish a link in the chain of evidence needed for conviction of a crime. Hoffman, H-o-f-f-m-a-n, versus United States, 341 U.S. 479, at 486, 1951.

The privilege doesn't allow a witness to refuse to

1 answer a question merely because he declares that the answer
2 would be incriminating. Rather, the privilege is confined to
3 instances, "Where the witness has reasonable cause to apprehend
4 danger from a direct answer." That's from Hoffman.

5 It's for the Court to decide whether an assertion of
6 privilege is justified and to compel the witness to answer, "If
7 it clearly appears to the court that he's mistaken." But a
8 witness's constitutional privilege against self-incrimination
9 doesn't depend upon a judge's prediction of the likelihood of
10 prosecution. Rather, it's only when there is but a fanciful
11 possibility of prosecution that a claim of Fifth Amendment
12 privilege is not well taken.

13 In re Folding Carton Antitrust Litigation, 609 F. 2d
14 867, at 871, Seventh Circuit, 1979. Therefore, when a witness
15 can demonstrate any possibility of prosecution which is more
16 than fanciful he has demonstrated a reasonable fear of
17 prosecution sufficient to meet constitutional muster. This
18 standard will be met where prosecution remains possible even if
19 it is unlikely that a prosecutor will decide to actually bring
20 charges. Id. at 872.

21 In the present case Blum's fear of prosecution is more
22 than fanciful. The statutes of limitation for potential state
23 and federal charges have not expired and neither the United
24 States nor the state has granted him immunity.

25 Further, I find that he has a reasonable fear that

1 most of the topics that plaintiff wants to cover in his
2 deposition could lead to self-incrimination. Questions about
3 his actions and observations on the night of October 23rd -
4 24th, 2004 could result in incriminating answers, and questions
5 about the actions of other officers at the scene could result
6 in answers that implicate Blum as a member of a criminal
7 conspiracy or answers that lead to criminal liability as a
8 party to a crime.

9 The statement is true for questions about the alleged
10 code of silence, thin blue line and or the Punishers.

11 Therefore, Blum can assert the privilege with respect
12 to questions on these topics.

13 However, Blum concedes that questions about the
14 policies, practices and customs of the City of Milwaukee with
15 respect to the hiring, training, supervision and discipline of
16 police officers are not reasonably likely to result in
17 self-incrimination and, therefore, he must answer questions on
18 these topics.

19 Further, it's not reasonably likely that Blum will
20 either incriminate himself or furnish a link in a chain of
21 incriminating evidence if he answers questions about his
22 deposition preparation, his background or his employment as a
23 police officer for the city before the month of October 2004.
24 Therefore, he is compelled to answer questions on these topics.

25 Finally, I note that plaintiff suggests that Blum

1 waived the privilege by testifying about the events that
2 occurred on the night of October 23rd - 24th, 2004 at earlier
3 proceedings, such as the criminal trial of other officers and
4 at his own hearing before the Fire and Police Commission.
5 However, a waiver of the Fifth Amendment privilege applies only
6 within the context of the proceeding in which the waiver was
7 made.

8 See McCormick on Evidence, Section 133. The criminal
9 trial and the hearing before the Fire and Police Commission
10 were separate proceedings. And although Blum may have waived
11 the privilege during those proceedings, he has not waived it
12 for purposes of the present case.

13 Therefore, plaintiff's motion to compel Blum's
14 testimony is granted in part and denied in part as discussed
15 above.

16 The parties' request for costs and fees pursuant to
17 Rule 37 are denied because both parties' respective positions
18 were substantially justified.

19 All right. I've already dealt with the Bartlett
20 issue. And now on the protective order about the city, I'm
21 ready to rule on that unless anybody wants to add anything.

22 MR. SAFRAN: Nothing from the plaintiff, Your Honor.

23 MS. HORWITZ: I think it's been adequately briefed,
24 Your Honor.

25 THE COURT: Okay. So on that plaintiff seeks a

1 protective order to prevent the city from asking him in his
2 deposition about topics that in plaintiff's view are not
3 relevant to the case and are embarrassing, including, One,
4 marital relationship between plaintiff and his ex-wife,
5 including their divorce; Two, details surrounding plaintiff's
6 convictions; Three, allegations of criminal conduct against
7 plaintiff; Four, plaintiff's incarceration and parole; and,
8 Five, plaintiff's relationship and contacts with other members
9 of his family.

10 The city argues that questions about these matters are
11 relevant or at the least are reasonably calculated to lead to
12 the discovery of admissible evidence because they go to the
13 issue of damages. Plaintiff seeks damages for past and future
14 loss of earnings, past and future medical expenses, past and
15 future pain and suffering.

16 The city argues that the facts and circumstances
17 surrounding his criminal convictions, parole revocations and
18 family relationships might be relevant to earning capacity and
19 that they might lead to discovery of evidence relevant to his
20 claim or to plaintiff's claim that the events of October 23rd -
21 24th have resulted in depression and post traumatic stress
22 disorder. Plaintiff argues that none of this evidence will be
23 admissible under the Federal Rules of Evidence and that,
24 therefore, the discovery is not relevant.

25 However, whether evidence will be admissible cannot be

1 determined until after the record has been fully developed.

2 Further, although the evidence may not be generally
3 admissible events that unfold at trial might make it
4 admissible. For example, plaintiff might through his testimony
5 open the door to evidence that would normally be inadmissible.
6 And in any case, the Rules of Civil Procedure contemplate
7 liberal discovery.

8 And I find that the city's questions are reasonably
9 calculated to lead to the discovery of admissible evidence and
10 that they are not designated to harass or embarrass plaintiff
11 or impose an undue burden on him.

12 Therefore, plaintiff's motion for a protective order
13 is denied. However, because plaintiff's motion was
14 substantially justified I will not award any costs or attorneys
15 fees.

16 MS. HORWITZ: Thank you, Your Honor.

17 THE COURT: Okay. So anything else?

18 MR. SAFRAN: Judge, a few other things.

19 THE COURT: Okay.

20 MR. SAFRAN: Just so the Court is kind of aware as to
21 what's going on. We are waiting for a ruling by Judge Clevert
22 that relates to the grand jury testimony that was elicited
23 before the criminal case was pursued in Federal Court.

24 THE COURT: Okay.

25 MR. SAFRAN: That may lead to other discovery, too.

1 We're also working with the District Attorney's Office in
2 Milwaukee County as far as trying to get, to confirm that we
3 have records that they have. Just some disputes about that
4 that we're trying to get resolved.

5 So I just want the Court to be aware that we are
6 trying to move the discovery along as quickly as we can, but
7 we're just having these somewhat roadblocks in our way that
8 we're trying to overcome to continue along.

9 There is the plan on the plaintiff's part to file some
10 additional motions that relate to scope of employment and
11 liability. My understanding in talking to the City Attorney
12 today, as I indicated to the Court, we are going to be amending
13 and bringing in an additional defendant, Ms. Belmore. My
14 understanding from the city is that they will be, the defense
15 has been tendered to them which I understand they have agreed
16 to accept.

17 I also understand they have agreed to the fact that
18 she is limited to the scope of her employment, but there is an
19 issue as far as outside counsel representing her. I don't know
20 if this is gonna be an issue that will ultimately have to come
21 before the Court. The counsel that the city has chosen also
22 are the same counsel that represent another defendant in this
23 case, as well as who represented Mr. Blum in the motion the
24 Court just decided.

25 There is some concern on the plaintiff's part that

1 there might be conflicts of interest that could arise as a
2 result of if their firm represents multiple defendants in this
3 case relating to cross claims. I understand the city wants to
4 wait and see the amended complaint that we file, which again we
5 hope to file today. Maybe that will get flushed out and won't
6 need to be something that we address with the Court.

7 And then we will probably, I guess, hold off a little
8 bit longer on Officer Schabel, who's again one of the two
9 uniformed officers that first arrived at the scene. He and Ms.
10 Belmore -- up to this point the city has taken the position
11 that Mr. Schabel was not in the scope of his employment at the
12 time the incident occurred. But now I understand that they are
13 going to, at least the city is going to meet with counsel about
14 that to make a determination.

15 If that continues to be the case that they have argued
16 that he was not within the scope of his employment, we do
17 intend to file a motion for judgment on the pleadings relating
18 to liability and probably a summary judgment motion relating to
19 the scope of employment issue. So we are going to go ahead and
20 file that, but I think we'll wait a little bit longer to see
21 what the city's response is in regard to that.

22 But those are additional motions we plan to file, and
23 maybe file regarding some of the other defendants, too, to see
24 if we can flush some of these issues out as this case proceeds
25 and that they certainly simplify this case as it proceeds

1 forward.

2 The other issue to bring in front of the Court again
3 goes back to Fifth Amendment issues that we have discussed.
4 The Court may be aware that three of the defendants who were
5 convicted, those would be Mr. Spengler, Mr. Masarik and Mr.
6 Bartlett, appealed to the Seventh Circuit. The Seventh Circuit
7 decision came back indicating that their convictions were
8 affirmed. The sentences were affirmed for Mr. Spengler and Mr.
9 Masarik, but as far as Mr. Bartlett it was sent back for
10 resentencing in front of Judge Clevert, and that's scheduled
11 for September 17th.

12 I have attempted to find out from Ms. Boyle, his civil
13 counsel, as to the position that she takes regarding the Fifth
14 Amendment issue. Given the fact if he does not go back -- I'm
15 sorry, Your Honor. To my understanding according to the
16 deadline, that the defendants have until September 7th to file
17 a petition with the U.S. Supreme Court regarding their
18 convictions, or the sentencing for the other two that have
19 already been affirmed.

20 I understand from defense criminal counsel for Mr.
21 Masarik is that he does plan to file with the U.S. Supreme
22 Court on issues relating to identification. So I'm assuming
23 his Fifth Amendment issues are going to continue.

24 As far as Mr. Bartlett, I understand that he is
25 probably not going to petition regarding his conviction, but

1 the issue still is ongoing regarding his sentencing. So we're
2 trying to find out from Miss Boyle whether or not she believes
3 that the Fifth Amendment after September 7th, if he doesn't
4 file his petition, whether that is somewhat waived, and maybe
5 we can go ahead and proceed with his deposition.

6 The other one is Mr. Spengler. I have attempted to
7 find out from Mr. Spengler's counsel, his criminal counsel, as
8 to their position in moving forward. And I received a fax
9 letter today, it was also copied to the Court. I wanted in
10 anticipation of the hearing today to be able to advise the
11 Court of how we might proceed with those depositions, and asked
12 Mr. Kinstler, who is his criminal defense counsel --

13 THE COURT: Yes, I got all that stuff.

14 MR. SAFRAN: And difficult to know from his response
15 what we do, but our position would be after September 7th --

16 THE COURT: You really need all these cops'
17 depositions? I mean, this case is going to go on for 30 years
18 trying to get them to say boo. Even if you got them to the
19 table they're not, I can't imagine they're going to say much to
20 help you.

21 MR. SAFRAN: Well, with Mr. Spengler he's never
22 testified. And, again, it was his badge that was stolen and he
23 kind of was the instigator of the whole thing. So his
24 testimony certainly might be very, very important in this case.

25 THE COURT: Yes, if he was willing to give any.

1 MR. SAFRAN: Yeah. And that's the question. If, our
2 position would be we might bring a motion to compel discovery
3 as of, after September 7th. If the position is that he has now
4 waived any Fifth Amendment --

5 THE COURT: Well, I don't know. You can bring
6 whatever motions you want. I just think that this is a tough
7 row to hoe for you as a practical matter. That's all.

8 MR. SAFRAN: Well, it is. And it's also compounded by
9 the fact that he is now pro se, where he has been pro se. And
10 the question is how he responds, and I don't know. That's why
11 I was trying to get Mr. Kinstler, his criminal defense counsel,
12 to give us some idea.

13 THE COURT: Well, he gave you an idea; right?

14 MR. SAFRAN: I guess that's right. So that's another
15 issue. Mr. Bartlett again will be coming back up here for his
16 resentencing on September 17th.

17 THE COURT: Okay.

18 MR. SAFRAN: If I can find out from Ms. Boyle whether
19 he still intends to assert his Fifth Amendment, we may want to
20 get his deposition scheduled while he's up here to avoid us all
21 having to go down to where he's incarcerated.

22 THE COURT: I'm sure he'll be totally eager to
23 cooperate.

24 MR. SAFRAN: Well, we'll see. That's what I'm trying
25 to find out from Ms. Boyle at least.

1 THE COURT: All right.

2 MR. SAFRAN: So we may proceed with some of those
3 depositions, but we may be having to deal with some of the
4 Fifth Amendment issues again.

5 THE COURT: Okay.

6 MR. SAFRAN: Just so the Court is aware of that.

7 MS. HORWITZ: Your Honor, just to, on that point with
8 Mr. Bartlett. In the event there is an indication that he
9 would cooperate and provide a deposition, is it possible for us
10 to have a room here as we did with Mr. Harris?

11 THE COURT: Absolutely.

12 MS. HORWITZ: Okay.

13 THE COURT: We'll do anything we can to facilitate any
14 depositions.

15 MS. HORWITZ: All right. Because I would anticipate
16 there would be a security issue with him being in custody.

17 THE COURT: Yes. No problem.

18 MR. SAFRAN: Although I'm not sure if he would be
19 housed here. He may only be housed here for a short time for
20 his resentencing and the rest of the time may be down in Racine
21 where the prisoners --

22 MS. HORWITZ: Whatever.

23 MR. SAFRAN: So we'll deal with that. Appreciate
24 that. I don't think there are any other issues to address
25 before the Court at this point, other than we'll just work on

1 the dates as far as extending those dates with a scheduling
2 order.

3 THE COURT: Yeah. Thank you.

4 MS. HORWITZ: Thank you, Judge.

5 MR. SAFRAN: Thank you, Your Honor.

6 (Morning proceedings concluded at 11:05 a.m.)

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12 UNITED STATES DISTRICT COURT
13 EASTERN DISTRICT OF WISCONSIN

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16 I, Cynthia M. Bohman, RMR, Official Court Reporter
17 for the United States District Court, Eastern District of
18 Wisconsin, Milwaukee, Wisconsin, hereby certify that the
19 foregoing is a true and accurate transcript of my stenographic
20 notes taken in the foregoing proceedings.

21
22 /s/ Cynthia M. Bohman

23 Official Court Reporter

24
25 Dated this 8th day of September, 2009.